DOCUMENT 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Plaintiff, No. 91-CV-76258-DT

v. HON. GEORGE E. WOODS

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Defendants.
_____/

ORDER DENYING DEFENDANTS' MOTION TO AMEND THE RECORD

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 20th day of February, 1996.

PRESENT: THE HONORABLE GEORGE E. WOODS
United States District Judge

This matter having come before the Court on defendants' motion to amend the record;

The Court having reviewed the pleadings submitted herein, and being otherwise fully informed in the matter;

IT IS HEREBY ORDERED that defendants' motion to amend the record shall be, and hereby is, DENIED.

This Court granted summary judgment in favor of defendants on May 16, 1995, and denied plaintiff's motion for reconsideration of the dismissal of her case on August 29, 1995. Plaintiff has appealed the dismissal of her case to the United States Court of Appeals of the Sixth Circuit and has filed her appeal brief.

Defendants now move to amend the record because "certain key deposition transcripts taken in this case were inadvertently not filed with the District Court and thus were not made a part of the District Court record." Defendants' Motion, p. 2. Defendants further assert that the transcripts "are integral to giving the Court of Appeals a full understanding of the facts of this case," and that "the information contained in these four key depositions has already been presented to this Court." Id. at 3.

Fed. R. Civ. P. 10(e) provides that a district court may correct the record on appeal "[i]f anything material to either party is omitted from the record by error or accident or is misstated therein." As plaintiff points out, however, Rule 10(e) merely provides for the correction of

clerical error or error by the Court; it does not allow attorneys to correct their own inadvertence. Plaintiff also is correct that the Court allowed both parties an opportunity to supplement the record before it ruled on the motion for reconsideration. Further, the Sixth Circuit must review the merits of the Court's rulings in this case only in the context of the information that in fact was before the Court. Torrington Co. v. Local Union 590 of Int'l Union, 803 F. 2d 927, 932 (7th Cir. 1986); Jones v. Jackson Nat'l Life Ins. Co., 819 F. Supp. 1385, 1386-87 (W.D. Mich. 1993). Finally, if defendants are correct that the information at issue already has become part of the record, the instant motion is unnecessary.

For the reasons stated, defendants' motion to amend the record shall be, and hereby is, DENIED.

So ordered.

GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

DOCUMENT 2

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Plaintiff,

v.

United States District Court
Case No. No. 91-CV-76258-DT
HON. GEORGE E. WOODS

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Defendants.
_____/

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ORDER OF DISMISSAL

At a session of said Court held in the U.S. District Court,

Eastern District of Michigan on _____.

PRESENT: HONORABLE _____
U.S. DISTRICT COURT JUDGE

This matter having come on for hearing on May 16, 1995, upon the Court's sua sponte Motion to Show Cause why Plaintiff's Complaint should not be dismissed in light of the Court's reading of **Joyce v. Mavromatis, 783 F. 2d 56 (6th Cir. 1986),** and after having read the briefs submitted by the respective parties hereto and after being otherwise fully advised in the premises;

IT IS HEREBY ORDERED that Count II, the remaining count in Plaintiff's Complaint, is hereby dismissed for the reasons stated on the record on May 16, 1995.

IT IS HEREBY ORDERED.

_____
HONORABLE GEORGE E. WOODS
U.S. District Court Judge

DOCUMENT 3

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Plaintiff,

-vs-

Case No. 91-CV-76258-DT
HON. GEORGE E. WOODS

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Defendants.
_____/

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

AT A SESSION of said Court, held in the United States Courthouse, in the City of Detroit, State of Michigan, on the 29th day of August, 1995.

PRESENT: HONORABLE GEORGE E. WOODS
United States District Judge

This matter having come before the Court on plaintiff's May 30, 1995, motion for reconsideration of the Court's sua sponte motion

to dismiss, as well as plaintiff's June 19, 1995 supplemental brief and exhibits in support of her motion for reconsideration of the Court's sua sponte motion to dismiss;

The Court having reviewed the pleadings submitted herein, and being otherwise fully informed in the matter;

IT IS HEREBY ORDERED that plaintiff's motion for reconsideration shall be, and hereby is, DENIED.

I. INTRODUCTION AND FACTS

Plaintiff is the personal representative of the estate of decedent Arnold Swekel, who was struck in the City of River Rouge, Michigan, as a pedestrian in an accident involving either one or two cars on September 30, 1988. Mr. Swekel ultimately died from his injuries on October 17, 1988. Defendants were police officers working for the City of River Rouge when the accident occurred and during all other relevant times. Plaintiff filed this suit in 1991 pursuant to 42 U.S.C. § 1983, alleging in part that defendants violated her right to access the courts by concealing the identity of the driver of one of the two possible cars involved in the accident.

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Plaintiff has alleged that during the police investigation of the accidents, rumors emerged in the community that the identity of the second driver was the son of a high-ranking police officer. Plaintiff asserts in part that defendants (1) ignored anonymous tips stating that Russell Kulinski, a police commander at the time of the accident, or his son, Todd, was one of the drivers who struck decedent, (2) failed to disclose to plaintiff the anonymous tips implicating the Kulinskis, despite the fact that plaintiff told the police that she suspected Todd Kulinski, (3) refused to investigate the possible link between the Kulinskis and the accident, even though some eye-witnesses has stated that two cars, not just one car, hit the decedent, (4) took the unusual step of not asking the officer who responded to the accident to attend the preliminary examination of the first driver, and (5) refused to interview Todd Kulinski. Plaintiff, who successfully pursued a wrongful death action against the first driver, argues that defendants' actions deprived her of a similar suit against the second driver.

Trial was scheduled to occur on May 15, 1995. The Court, however, dismissed the case on that date in an opinion from the bench. Plaintiff now requests reconsideration of the dismissal.

II. STANDARD

Local Rule 7.1(h) provides:

> Generally, and without restricting the discretion of the Court, motions for rehearing or reconsideration which merely present the same issues ruled upon by the Court, either expressly or by reasonable implication, shall not be granted. The movant shall not only demonstrate a palpable defect by which the Court and the parties have been misled but also show that a different disposition of the case must result from a correction thereof.

This particular motion for reconsideration, however, comes before the Court in an unusual procedural posture. This case was scheduled for trial on May 15, 1995. The Court notified the parties by telephone on May 11, 1995 that it was ordering plaintiff to show cause why the case should not be dismissed in light of controlling precedent that the Court had found on the night of May 10, 1995 while researching one of plaintiff's motions in limine. The parties submitted briefs to the Court as requested on May 14, 1995, and the Court issued an opinion from the bench on May 15, 1995, dismissing plaintiff's remaining claim. Plaintiff accordingly filed on May 30, 1995 a motion for reconsideration and a brief in support ("May 30, 1995 Brief"), in which she requested the Court either to reverse its

decision immediately or to allow her to file additional briefs and exhibits. The Court responded by issuing an order on June 2, 1995, allowing plaintiff to file by June 19, 1995 any additional arguments or exhibits that she thought appropriate. The Court also allowed defendants to respond to any additional filings by plaintiff. Although plaintiff filed a second brief in support of its motion for reconsideration ("June 19, 1995 Brief"), defendants have not responded to the instant motion.

Given the brief period of time in which plaintiff had to react to the Court's May 11, 1995 order to show cause, as well as the fact that the Court now has before it a much more complete record, the Court will not hold plaintiff to Local Rule 7.1(h)'s general "palpable defect" standard. The Court instead will reexamine all of plaintiff's arguments and exhibits anew in order to determine whether she should proceed to trial on her right of access claim.

The Court must employ Fed. R. Civ. P. 56(c)'s standard for summary judgment motions when deciding whether a genuine issue of material fact exists as to whether plaintiff has a viable claim. In order to avoid summary judgment, plaintiff must identify sufficient evidence

in the record to allow a reasonable jury to find for her at trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Matsushita Electric Ind. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). The sufficiency of the evidence is to be tested against the substantive standard of proof that would control at trial. Anderson, supra. Plaintiff should proceed to trial unless an absence of evidence supports her claim. Celotex v. Catrett, 477 U.S. 317, 325 (1986). "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256. This Court must consider the evidence in the light most favorable to plaintiff, but it also may weigh competing inferences for their persuasiveness. Matsushita, supra.

III. ANALYSIS

Plaintiff has asked the Court to reconsider both its analysis of Sixth Circuit precedent and its application of that precedent to the facts. The Court will address each request in turn.

A. Interpretation of Sixth Circuit Precedent

The Court has ruled that the dismissal of plaintiff's case is compelled by the Sixth Circuit's holding in Joyce v. Mavromatis, 783 F.2d 56, 57 (1986), a case which narrowly construed the right of access to the courts. Plaintiff has argued that the Joyce opinion applied only an equal protection and procedural due process analysis, thereby failing to consider that the right of access to the courts is a fundamental right.[1] Plaintiff argues that this analytical failure led the Joyce Court to require plaintiffs in right-to-access cases to demonstrate that defendants successfully prevented them from filing a lawsuit. Plaintiff concludes that this requirement is no longer valid in light of the Sixth Circuit's subsequent ruling in Graham v. Nat. Collegiate Athletic Ass'n, 804 F. 2d 953, 959 (1986), that the right of access is fundamental.

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[1] Plaintiff's characterization of the law has been somewhat inconsistent. Plaintiff has argued occasionally that she has a right of *unhampered* access to the courts. See p. 3, Plaintiff's June 19, 1995 Brief. Nonetheless, plaintiff also has conceded occasionally that defendants could have violated her right of access only if they *completely* prevented her from filing a suit against the Kulinskis. See p. 4-6, Plaintiff's May 30, 1995 Brief.

Plaintiff's characterization of Joyce is incorrect. The Joyce Court explicitly indicated in two separate portions of the opinion that it was ruling on *three* distinct constitutional claims, one of which was a substantive First Amendment claim of access to the courts. See Joyce, 783 F. 2d at 57. The Joyce opinion therefore properly analyzed the right of access as a fundamental right, yet nonetheless construed that right very narrowly.[2] Moreover, Graham actually reaffirmed the holding in Joyce by implying that the right of access to the courts is not an expansive right. See Graham, 804 F. 2d at 959 (stating that "[plaintiff] cannot claim, however, that the defendants completely denied him access to the courts, since he successfully pursued his state court action ... Rather, [his claim] is more accurately characterized as a claim of retaliation for the exercise of a First Amendment right") (emphasis added).

B. Application of Joyce to the Facts

As noted, the instant issue turns upon whether defendants

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[2]The result in Joyce is consistent with the fact that the declaration of an abstract fundamental right, standing alone, reveals nothing about the practical content of that right.

prevented plaintiff from bringing a wrongful death action against one or both of the Kulinskis. The Joyce opinion allows an access to the courts claim to proceed only if the state actors have succeeded to a sufficient degree in denying a plaintiff actual access. An access to the courts claim therefore serves as a vehicle to recoup damages which should have been awarded in the lost cause of action, not as an opportunity to sue state actors for reprehensible but ultimately ineffectual actions. The constitutional violation arises from results, not mere effort.

The Court finds that, even if everything that plaintiff has alleged is true, no genuine issue of material fact exists as to whether plaintiffs eventually could have pursued a viable tort claim against either one of the Kulinskis. Plaintiff has submitted considerable evidence regarding what defendants knew during the three-year statute of limitations period about the link between the Kulinskis and the accident. What *plaintiff* knew about the alleged second driver, however, is also important for the purposes of the instant motion. Plaintiff admits:

> From September 30, 1988 through September 30,

> 1991, the information available to [plaintiff] and her attorney Judge Bajorek through their investigation was merely that there was a second driver. This information was forwarded by them to the police in 1989 and 1990 with a request that the investigation be reopened prior to the statute of limitations running. The police refused.

P. 10, Plaintiff's May 30, 1995 Brief. Plaintiff's belief in the existence of a second driver was based partly on the April 28, 1989 deposition testimony of the reporting officer, Dwight Courtland, that four witnesses had stated that two cars were involved, as well as direct deposition testimony on June 28 and December 5, 1989 by two of those witnesses. See Exhibit B, C, & D id. Plaintiff therefore firmly knew or thought that she knew by 1989 that a second driver had been involved in the accident.

After the police closed the criminal investigation into the accident, plaintiff reported to defendant Cooper that she had heard rumors that Todd Kulinski was the driver of the second vehicle. ¶ 4, Exhibit B, Plaintiff's June 19, 1995 Brief. Plaintiff also told defendant Cooper in 1989 that she felt that Todd Kulinski was in fact the second driver. P. 115-16, Exhibit A, Plaintiff's May 30, 1995 Brief. Moreover, plaintiff has admitted that, during the civil suit against the

first driver, her attorney "drove by the Kulinski residence and noticed a mid-size blue automobile in the driveway, which fit the description of the second car as testified by Estel Chaffins." ¶ 8, Exhibit A, Plaintiff's June 19, 1995 Brief.[3] Likewise, during a June 28, 1989 deposition, counsel for plaintiff asked an accident witness whether he knew Todd Kulinski. See P. 19, Exhibit D, Plaintiff's May 30, 1995 Brief. Plaintiff therefore believed by 1989 that Todd Kulinski was the second driver and made limited efforts to investigate and confirm that belief.

Judge David A. Bajorek, who represented plaintiff prior to the filing of this suit, has stated in an affidavit that he never was able to amass enough facts to sue the Kulinskis before the statute of limitations had run without risking sanctions for having filed an improper action based upon mere rumor. Exhibit A, Plaintiff's June

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[3]Plaintiff deposed EstelChaffins on December 5, 1989. Mr. Chaffins testified at deposition that two cars were involved in the accident and that the second car was a two-door, mid-sized, medium metallic-blue vehicle. P. 9, Exhibit C, Plaintiff's May 30, 1995 Brief. Counsel for plaintiff sent Mr. Chaffins' statement to the police in early 1990 when requesting that the investigation into the accident be reopened. ¶ 7, Exhibit A, Plaintiff's June 19, 1995 Brief; p. 120, Exhibit A, Plaintiff's May 30, 1995 Brief.

19, 1995 Brief. Likewise, plaintiff argues that it was only through discovery in this case that she finally determined with sufficient certainty the identity of the second driver.[4] Exhibit B, id. These assertions, however, directly contradict the fact that plaintiff felt that she had accumulated enough facts before the statute of limitations had run to file *this* lawsuit, a suit based upon the same "mere rumors" that apparently could not support a suit naming the second driver. Plaintiff cannot claim simultaneously that (1) she had sufficient knowledge, based on rumors in the community that Todd or Russell Kulinski was the second driver, to sue defendants for protecting somebody with connections to the police department,[5] and (2) she nonetheless lacked sufficient knowledge to file a tort suit naming the Kulinskis. Moreover, *even if* defendants succeeded in making plaintiff believe

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[4]Specifically, plaintiff states that the March 16, 1992 deposition of defendant Cooper and the October 22, 1992 deposition of Officer Robert Warren finally confirmed that the police had been protecting the Kulinskis. P. 6, Plaintiff's May 30, 1995 Motion.

[5]The premise of this suit is not and could not be that the police were merely very sloppy and thereby unwittingly allowed someone (who could have been anyone) to escape justice. See, e.g., Bell v. City of Milwaukee, 746 F. 2d 1205, 1261-62 (7th Cir. 1984).

that she could not file a suit immediately naming one or both of the Kulinskis, she still believed long before the statute of limitations period had run that defendants were protecting the Kulinskis. She therefore could have filed an earlier "John Doe" suit against the second driver and secured all of the same information she now has through discovery in that suit. Although John Doe suits do not toll the statute of limitations in Michigan, see, e.g., Fassalare v. Desa Industries, Inc., 135 Mich. App. 1, 6 (1984), plaintiff did not have to file her suit as she did, on the last possible day.[6] She at the very least had sufficient facts to file a John Doe suit, pursue discovery, and amend her suit by adding the particular identity of the second driver before the expiration of the statute of limitations.[7] Ultimately,

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[6]The statute of limitations in Michigan for wrongful death actions is three years from the time of the injury. Hardy v. Maxheimer, 429 Mich. 422 (1987). Because the accident occurred on September 30, 1988, the last day that plaintiff could have filed a lawsuit against the second driver was September 30, 1991.

[7]Plaintiff has argued that the Court mistakenly found during its May 15, 1995 dismissal of this case that plaintiff should have known about the involvement of the Kulinskis because defendant Cooper had disclosed in deposition in this suit that the police had received tips that one of the Kulinskis was the second driver. See P. 4, Plaintiff's May 30 Motion. The Court, however, was not relying

plaintiff could have, and should have, pursued a suit against the Kulinskis, even though she in fact did not.

IV. CONCLUSION

Accordingly, plaintiff's motion for reconsideration shall be, and hereby, is DENIED.

So Ordered.

GEORGE E. WOODS
UNITED STATES DISTRICT JUDGE

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upon this deposition testimony as evidence that plaintiff had sufficient knowledge regarding the Kulinskis to file suit before the statute of limitations had run. The Court mentioned defendant Cooper's testimony merely because it was reminding the parties that it previously had denied defendants' motion for summary judgment on the basis that the evidence, including the deposition testimony of defendant Cooper, had raised an issue of fact as to whether the police intentionally were protecting a particular person. See p. 13, Exhibit 1, Plaintiff's June 19, 1995 Motion in Support of Reconsideration. This reminder was part of an overall explanation that plaintiff could not proceed if her theory of this case was that the lack of an adequate investigation alone showed that the police must have been protecting "somebody." Id.

DOCUMENT 4

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DELORES MARIE SWEKEL,
Plaintiff -Appellant,

NO. 95-2031

V.

CITY OF RIVER ROUGE,

Defendant,

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, WILLIAM COOPER AND DAVID ISRAEL,

Defendants-Appellees,

Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.
No. 91-76258--George E,. Woods, District Judge

Argued for Appellant: October 18, 1996
Submitted for Appellees: October 18, 1996

Decided and Filed: July 23, 1997

Before: MERRITT, JONES, and COLE, Circuit Judges

COUNSEL

ARGUED: Morgan J.C. Scudi, HUTH, LYNETT & SCUDI, San Diego, California, for appellant. **ON BRIEF:** Morgan J.C. Scudi, HUTH, LYNETT & SCUDI, San Diego, California, Thomas G. McHugh, Mt. Clemens, Michigan, for Appellant. John J. Cibrario, Westland, Michigan, for Appellee.

JONES, J., delivered the opinion of the court, in which COLE, J., joined. MERRITT, J. (pp. 12-14), delivered a separate concurring opinion.

OPINION

NATHANIEL, R. JONES, Circuit Judge. Plaintiff, Delores Swekel, appeals the district court's *sua sponte* dismissal of her suit under 42 U.S.C. § 1983 claiming that Defendants denied her access to the courts. Because Swekel failed to represent evidence that the Defendants' actions rendered a state court remedy ineffective, we now AFFIRM.

I.

On September 30, 1988, at approximately 11:00 p.m., Arnold F. Swekel attempted to cross a street in River Rouge, Michigan. While crossing the street, either one or two cars speeding down the street hit and fatally injured Mr. Swekel.

After the accident, Officer Dwight Black went to the scene and interviewed witnesses. Apparently four witnesses told Officer Black that two cars were involved in the accident. Officer Black then filed a police report that provided a description of the two vehicles involved. After filing the report, Officer Black was removed from the case.

Additionally, the daily log sheets for the night of September 30, 1988

disappeared after the incident. The Plaintiff alleges that the log sheet would reveal that the incident involved two vehicles.

Mr. Swekel was in the hospital for seventeen days before he passed away on October 17, 1988. Delores Swekel. ("Swekel"), the widow and personal representative of the estate of the decedent, allegedly requested that the police interview him during this period, but they declined.

Swekel claims that following the accident the police engaged in an immediate cover up of the second driver because he was the son of a high-ranking police officer. She alleges that even though the witnesses stated two drivers were involved, and all of the evidence pointed towards the high-ranking police officer or his son, the police never investigated either of them.

Accordingly to Swekel the Defendants: (1) failed to perform forensic tests on Mr. Swekel's clothes; (2) ignored the responding officer's report that two cars were involved; (3) told the responding officer not to attend the preliminary hearing, though it is customary for the responding officer to attend; (4) ignored anonymous tips stating that Russel Kulinski, a police commander at the time of the accident, or his son, Todd, was one of the drivers who struck Mr. Swekel; (5) refused to investigate the link between the Kulinskis and the second driver; (6) refused to interview Todd Kulinski; and (7) failed to disclose to Plaintiff the anonymous tips implicating the Kulinskis, despite the fact that Plaintiff told the police that she suspected Todd Kulinski.

Swekel successfully pursued a wrongful death action against the first driver. She claims that Defendants' actions deprived her of a similar suit against the second driver, because she could not discover his identify before her time to file suit expired under the Michigan statute of limitations. In fact, she claims that she did not discover the identify of the second driver until discovery in this suit. Swekel's attorney believed that as a result of the police coverup, he lacked the evidence to filed suit and would have subjected himself to sanctions if he filed suit.

The federal case for denial of access to the courts was set to go to trial

on May 15, 1995. On May 11, 1995, the district court ordered Swekel to show cause why it should not dismiss the case in light of *Joyce v. Mavromatis*, 783 F.2d 56 (6th Cir. 1986) (holding that plaintiff was not denied access to courts if she could file a viable suit in state court). In her brief to the district court, Swekel argued that the Defendants' cover-up of the identify of the second driver caused the statute of limitations to run and, thus, amounted to her legally being barred from filing suit. The district court disagreed and held that she could have filed a "John Doe" suit against the second driver in state court and then amended it when she discovered the second driver's identity.

The district court found that Swekel possessed a sufficient factual basis to file a "John Doe:" suit in state court. These facts are as follows: On December 5, 1989, the Plaintiff deposed Estel Chaffins, who testified that two cars were involved in the accident. Furthermore, in another deposition taken on June 28, 1989, Plaintiff's counsel asked an accident witness whether he knew Todd Kulinski. Finally, in early 1990, Plaintiff's counsel sent a copy of Mr. Chaffins's statement to the police and requested that they re-open the case. These actions demonstrated to the district court that Swekel knew of a second driver before the three-year statute of limitations had run and could have filed a suit in state court against a "John Doe" defendant. The district court conceded that "John Doe" suits do not toll the statutes of limitations in Michigan, *see, e.g., Fazzalare v. Desa Indus., Inc.* 135 Mich. App. 1, 6(1984), but reasoned that with the aid of discovery Swekel may have been able to discover the identify of the second driver before the statute ran. Consequently, the district court granted summary judgment to Defendants *sua sponte*.

Swekel moved for reconsideration, which the district court denied. She then filed this timely appeal.

II.

"We review a district court's grant of summary judgement *de novo*... {I} a motion for summary judgment, 'credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from

the facts are jury functions, not those of a judge... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Russo v. City of Cincinnati*, 953 F.2d 1036, 1041-42 (6th Cir. 1992) (quoting *Anderson v. Liberty Lobby, Inc.), 477 U.S. 242, 255 (1986)*, and citing *Vollrath v. Georgia-Pacific Corp.*, 899 F.l2d 533, 534 (6th Cir., cert. denied, 490 U.S. 940 (1990)); see also *Rowley v. United States*, 76 F.3d 796, 799 (6th Cir. 1996). Summary judgment is appropriate when the record "shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. 56(c).

On appeal, Plaintiff argues Defendants denied her the right of access to the courts by covering up for a high ranking police officer and his son. "It is beyond the dispute that the right of access to the courts is a fundamental right protected by the Constitution." *Graham v. National Collegiate Athletic Ass'n*, 804 F.2d 953, 959 (6th Cir. 1986). In fact, the right of access to the courts finds support in several provisions of the Constitution including: the Due Process Clause of the Fourteenth Amendment, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974), the Equal Protection Clause, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987), the First Amendment, *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Johnson v. Avery*, 393 U.S. 482 (1969)), and the Privileges and Immunities Clause of Article IV, see, e.g., *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 1242, 148 (1907); *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990).

The right of access in its most formal manifestation protects a persons;' right to physically access the court system. Without more, however, such an important right would ring hollow in the halls of justice. *See Chambers*, 207 U.S. at 148 ({"In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship...."). Access to courts does not only protect one's right to physically enter the courthouse halls, but also insures that the access to courts will be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). Therefore, if a party engages in actions that effectively cover-up evidence and this action renders a plaintiff's state

court remedy ineffective, they have violated his right of access to the courts. See *Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984) ("To deny such access defendants need not literally bar the courthouse door or attack plaintiffs' witnesses."). Otherwise, to what avail would it be to arm a person with such a constitutional right, when the courtroom door can be hermetically sealed by a functionary who destroys the evidence crucial to his case. A contrary interpretation of this right would encourage "police officials to conceal the circumstances relating to unlawful killing committed under color of state law and other deprivations of federal rights Section 1983 was designed to remedy." *Id.*

Several courts have found that a state official's actions in covering-up evidence amounted to a denial of access to the courts. For example, in *Bell, supra*, the police covered up a murder by one of their officers by concealing key facts from the family of the murder victim. *Id.* at 1215-17. The court found that "a conspiracy to cover up a killing, thereby obstructing legitimate efforts to vindicate the killing, through judicial redress, interferes with the due process right of access to courts." *Id.* at 1261. The court reasoned that the "constitutional right [of access to the courts] is lost where, as here, police officials shield from the public and the victim's family key facts which would form the basis of the family's claims for redress." *Id.*

In *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983), the parents of a murder victim filed suit alleging that two prosecutors covered up the fact that a murder had occurred and that the murderer was a fellow prosecutor. The plaintiffs claimed that by concealing such facts for eleven months, the defendants had caused them to delay bringing a wrongful death action against the murder, and thus "wrongfully interfer[ed] with their access to the state courts." *Id.* at 969-70. The Fifth Circuit held that the delay created by the defendants could be a constitutional deprivation if the conduct prejudiced the plaintiff's chances of recovery in state court. *Id.* at 974.

In another denial of access case, j*Crowder v. Sinyard*, 884 F.2d 804 (5th Cir. 1989), *denied*, 496 U.S. 974 (1990), *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990), the Firth Circuit

summarized Ryland as follows:

> Ryland stands for the proposition that if state officials wrongfully and intentionally conceal information crucial to a person's ability to obtain redress through the courts, and do so for the purpose of frustrating that right, and that concealment and the delay engendered by it substantial reduce the likelihood of one's obtaining the relief to which one is otherwise entitled, they may have committed a constitutional violation.

Id. at 812. The plaintiffs in *Crowder* claimed that the defendants seized their property and removed it from Texas to Arkansas, denying them the ability to bring suit in Texas to recover their property. *Id.* at 813. The court found that the plaintiffs were not denied access to the courts, and that the defendants were amenable to suit under the Texas Long Arm Statute. *Id.* at 814. The Fifth Circuit held that even through the property was removed from Texas, the plaintiffs had unimpeded meaningful access to both the state and federal courts to challenge the legality of the defendants' actions. *Id.*

The Defendants argue that this court's decision in *Joyce v. Mavromatis, supra,* is dispositive in this case. In *Joyce,* the plaintiff alleged that she was injured in an accident caused by the son of the Steubenville, Ohio, police chief. 783 F.2d at 57. She filed a § 1983 action claiming that the defendants, police officers, "sought to defeat her state court damage suit by revoking a traffic citation issued to the son [of the police chief]...in connection with the accident and by altering the police report filed by ...the officer who investigated the accident and by having new lines painted on the street at the intersection." *Id.* She argued that these actions violated her right to due process, access to the courts, and equal protection. The district court dismissed the action. This court affirmed. *Id.* The plaintiff knew the identify of the defendant, had a pending state court damage suit when the actions occurred, and could bring these allegations to the attention of the state court judge. Thus, the defendants did not deny her access to the courts, because she had all of the relevant facts at her disposal. Furthermore, this court found that "there is no

reason to believe that an Ohio court and jury would be unavailable and would not do justice between the parties. Rather than having denied access, the defendants have opened themselves to punitive damages and converted a small claims matter into a significant case, albeit not a federal case." *Id.*

The crucial distinction between the *Joyce* decision and this case is that the plaintiff in *Joyce* knew the identify of the defendant and had all of the requisite facts to file suit. Moreover, it appears that at the time the *Joyce* defendants took these actions, the plaintiff already had a pending "state court damage suit." *Id.* Thus, the *Joyce* plaintiff was not denied access to the court. None of the alleged abuses prevented her from filing suit or obtaining effective redress. See *Thompson v. Boggs*, 33 F.3d 847, 852-53 (7th Cir. 1994); *Foster v. City of Lake Jackson*, 28 F.3d 425, 430 (5th Cir. 1993). Therefore, *Joyce* is not dispositive of this case.

A court must analyze several factors before deciding whether a person's fundamental right of access to the courts have been violated. First, a court must ascertain whether the above occurred pre- or post-filing. When the abuse transpires post-filing, the aggrieved party is already in court and that court usually can address the abuse, and thus, an access to courts claim typically will not be viable.[1] If the abuse occurs pre-

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[1] Our decision to limit the right of access to the courts to pre-filing abuses in most instances finds support in both the Fifth and Seventh Circuits. In *Foster v. City of Lake Jackson*, 28 F.3d 425 (5th Cir. 1993), the plaintiffs claimed the defendant's failure to maintain a traffic light caused their son's death, and that the defendants denied them access to the courts by concealing and suppressing evidence during discovery. *Id.* at 427. The Fifth Circuit held that "the right of access [to the courts]...encompasse[s] a right to file an action, but not the rights to proceed free of discovery abuses after filing." *Id.* at 430.

The Seventh Circuit reached a similar conclusion in Thompson v. Boggs, 33 F.3d 847 (7th Cir. 1994), *cert. denied*, 115 S. Ct. 1692 (1995). In *Thompson*, the plaintiff claimed the police used excessive force and denied him access to the courts by committing critical facts in their police reports. *Id.* at 852. The Seventh Circuit held that the defendants' actions did not amount to a denial of the plaintiff's

(continued...)

filing, then the plaintiff must establish that such abuse denied her "effective" and "meaningful" access to the courts. *Bounds*, 430 U.S. at 822. She can do this only by showing that the defendants' actions foreclosed her from filing suit in state court or rendered ineffectively any state court remedy she previously may have had. *See Crowder*, 884 F.2d at 812-13; *Bell*, 746 F.2d at 1261; *Ryland*, 708 F.2d at 974-75. In most instances, state courts can address pre-filing abuses by tolling the statute of limitations or allowing for a "spoliation of evidence" lawsuit.

The case at bar involves alleged pre-filing the abuses. Swekel claims that the Defendants effectively denied her access to courts by failing to investigate the possibility of a second driver and covering up any such evidence. She claims that the Defendants' actions caused Michigan 's three-year statute of limitations to run before she could file suit. We agree with Swekel, that if true, the Defendants' actions are reprehensible. Yet, that is not the issue before us. Instead, we must determine whether their actions amounted to a constitutional violation.

The alleged actions occurred pre-filing, and thus, Swekel bears the burden of showing that such actions foreclosed her from filing suit in state court. The most compelling evidence would be if Swekel went to the state courthouse and was physically prevented or mechanically barred fro filing her lawsuit or her sit was dis missed as untimely. Swekel has not presented any such evidence. Therefore, we agree with the district court that Swekel has failed to show absolute denial from state court.

Our inquiry however, does not conclude at this point. This case does not involve an issue of whether the Plaintiff could enter the courthouse and file suit, but instead whether filing such a suit was rendered ineffective by the Defendants' actions.

Swekel alleges that the police covered-up proof against one of their

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[1](...continued)
right to access the courts because the plaintiff was present at the scene, knew all of the facts, and had sufficient facts to promptly file a law suit. *Id.* at 852-53.

own, destroyed critical evidence, and delayed Swekel's own investigation. These allegations, if true, would substantially prejudice Swekel's ability to recover in state court. Delay alone causes "state evidence and the fading of material facts in the minds of potential witnesses." *Ryland*, 708 F.2d at 975; *see also Rhewark v. Shaw*, 628 F.2d 297, 303-04 n.10 (5th Cir. 1980) (citation omitted) ("Delay haunts the administration of justice.... The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination."), *cert. denied*, 450 U.S. 931 (1981). Swekel, however, never presented evidence that the state court could not adequately address these problems.[2] In fact, none of the evidence before this court establishes that Swekel even attmepted to go to the state court in first instance. Before filing an "access to courts" claim, a plaintiff must make some attempt to gain access to the courts; otherwise, how is this court to assess whether such access was in fact "effective " and "meaningful"?

A plaintiff cannot merely guess that a state court remedy will be ineffective because of a defendant's actions. Rather, the plaintiff must present evidence that the defendants' actions actually rendered any available state court remedy ineffective. Swekel has failed to do so.

III.

Accordingly, we **AFFIRM** the district court's grant of summary judgment.

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We recognize that in some instances it would be completely futile for a plaintiff to attempt to access the state court system. The Plaintiff, however, has not presented evidence that this is such a case.

CONCURRENCE

MERRITT, Circuit Judge concurring. I agree with the result reached and much of the reasoning of the court's opinion. But I do not agree iwth the pre-filing/post-filing distinction made by the court or its failure to make explicit the limitations on right of access claims.

In 1986, in the same kind of auto accident case as this one (involving the cover-up evidence by a police chief of his son's negligence). A unanimous court held:

> The First Amendment access-to-the-courts claim does not state a cause of action either. The plaintiff has the right under state law to file her damage suit and to offeroof about the accident and the alleged destructuon of relevant evidence. If she is able to prove that the police cief's son and his conferederates undertook to destroy evidence of the son's negligence as a driver, there is no reason to believe that an Ohio court and jury would be unavailable and would not do justice between the parties. Rather than having denied access, the defdendants have opened themselves to punitive damages and converted a small claims matter into a significant case, albeit not a federal case.

Joyce v. Mavromatis, 783 F.2d 56 (6th Cir. 1986). The court in *Joyce* did not make the case turn on whether the state court lawsuit had laready b4een filed or not, and the court's opinion treates tis distinction as irrelevant. It treats it as irrelevant because if a state court is able to deal adequately with cover-up activities that occur after tn action has been filed, the state court is equally able to deal with sucha ctivities thato ccur before the action filed. A otential plaintiff is no less likely to receive adequate relirf ins tate ocurt merely because her allegations of a cover-up are placed in her initial complaint rather than in a motion or other

pleading following the initiation of the case.

The standard for a "right-of access to the courts" claims, whether treated under the First Amendment as part of the right "to petition the government for a redress of grievances" or as a procedural due process claim, sould require that the plaintiff alleged and prove that the state's judicial process does not rovide fair procedures to remedy the wong alleged. Proof of the lack of adequate state remedies is required by *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), in procedural due process cases and should be required in judicial access cases. It seems elementary that the federal right of access to the ocurts is not abridges when the state courts remain just as open to provide a remedy as the federal courts.

A concealment of evidence that would merely toll the running of the state statute of limitations or give rise to a state action for "spoliation of evidence"[1] does not "deny access" to the state courts. There must be an allegation and then a showing that the doors of the state courthouse have

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In Smith v. Howard Johnson Company, Inc., 615 N.E.2d 1037, 1038 (Ohio 1993), a United States District Court certified to the Supreme court of Ohio a list of questions concerning the existence of the tort of "intentional or negligence spoliation of evidence and/or tortious interference with prospective civil litigation." The Ohio Supreme Court unanimously answered the questions as follows:

> We answer the three questions as follows: (1) a cause of action exists in tort for interference with or destruction of evidence; (2a) the elements of a claim for interference with or destruction of evidence are (1) pending or probable litigation involving the plaintiff, (2) knowledge on the part of defendant that litigation exists or is probable, (3) willful destruction of evidence by defendant designed to disrupt plaintiff's case, (4) disruption of the plaintiff's case, and (5) damages proximately caused by the defendant's acts; (2b) such a claim should be recognized between the parties to the primary action and against third parties; and (3) such a claim may be brought at the same time as the primary action.

Although the instant case comes from ichigan rather than ohio, there is no suggestion that Michigan would not provide a remedy in tort for the wrong alleged here.

been closed by the defendant's action or that the state court remedy has been rendered ineffective. We should not simply displace the normal state court remedies for spoliation or concealment of evidence or obstruction of state judicial proceedings with a new, expanded, loosely worded, federal constitutional tort under § 1983. Right of access to the courts claims under the federal constitution should be reserved for situations in which adequate state remedies are made unavailable and should not include mere claims of interference with evidence.

DOCUMENT 5

UNITED STATES OF AMERICA
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

DELORES MARIE SWEKEL, Personal Representative of the Estate of ARNOLD F. SWEKEL, Deceased,

Plaintiff,

-vs-

Case No. 91-CV-76258-DT
Hon. George E. Woods
Opinion

GREGORY HARRINGTON, WILLIAM ABAIR, JOHNSON TAYLOR, DETECTIVE WILLIAM COOPER and DAVID ISRAEL, jointly and severally,

Defendants.
_____/

Proceedings had in the above-entitled cause before the HONORABLE GEORGE E. WOODS, United States District Court Judge, at 272 United States Courthouse, Detroit, Michigan, on Tuesday, May 15, 1995.

APPEARANCES:

For the Plaintiff:

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Official Court Reporter:

BARBARA C. CHATMAN, CSR-0077
277 United States Courthouse
Detroit, Michigan 48226

Detroit, Michigan

Tuesday, May 15, 1995

12:00 o'clock noon

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THE COURT: Let's see. Mr. McHugh, right?

MR. McHUGH: Yes.

THE COURT: Mr. Scudi?

MR. SCUDI: Yes, your Honor.

THE COURT: Did I mispronounce it? That is your most precious thing that you have.

Mr. Grifka and Mr. Olson.

Well, this is a little bit different than usual than what we have in the system.

Earlier today I was trying to think that after 46 years in the business as a lawyer and Judge, how many times that it has happened to me that the Court has in effect, sua sponte, come up with a motion or an Order to Show Cause sua sponte as to why a plaintiff's case should be or should not be dismissed.

Frankly, I am having difficulty trying to remember it ever

having happened. I suppose perhaps other Judges have had it happen, I am sure they have. But it doesn't happen too often I gather in the scheme of things.

One of the reasons being, of course, that merely because a complaint is filed in the Clerk's Office, whether we are talking about state or Federal Court, it doesn't mean that the Court should immediately assume in effect the role of co-counsel for the defense, and certainly not the plaintiff as well, as the case may be.

Let me go into the background of this case a little bit.

By the way, Counsel, you have, after this shotgun blast at you, you have both responded promptly in well-written briefs, and the Court is appreciative of that.

The plaintiff in this case is the personal representative of the estate of the decedent, a gentleman by the name of Arnold Swekel. This gentleman was killed as a pedestrian in an accident involving either one or two cars, as it turns out.

The defendants here were police officers when this accident took place and during all other relevant times.

The plaintiff filed suit in, I think, 1988, pursuant to Section

1983 of Title 42 of the United States Code, alleging at least in part that the defendants violated her right to access to the courts by in effect consciously, as a matter of conspiracy, concealing the identity of the driver of one of two cars that might have been involved killing this decedent.

The Court, as you are aware, of course, earlier remanded the plaintiff's state law claims and has granted summary judgment on all other claims except for the claim that Defendants violated Plaintiff's right of access to the courts by conducting a coverup. Pure and simple.

The plaintiff filed a motion in limine to exclude the defense of qualified governmental immunity on the 9th of May, 1995, a week ago. Then, as the way the ball bounced or the cookie crumbled, as they say, the Court in researching that motion first became aware of the potentially dispositive precedent of Joyce v. Mavromatis, M-A-V-R-O-M-A-T-I-S out of the Sixth Circuit in 1986.

So, then the Court, sua sponte, issued on May 12 an Order to show cause why the plaintiff's case should not be dismissed in light of the Joyce opinion.

The Court contacted all counsel here involved by telephone, requested written briefs to be filed by one o'clock p.m. on May 15, 1995, and informed counsel of the instant hearing here today. They have done so and it's a matter of yeoman services.

Clearly the plaintiff, without any question, enjoys a constitutional right of access to the courts. The precise issue before the court is whether the Sixth Circuit has defined that right to narrowly that, under the particular circumstances of this case, Plaintiff does not have a cause of action because Defendants could not have violated her right of access to the courts.

In the Joyce case, the Sixth Circuit indicated that it strictly interpreted the right of access to the courts. The plaintiff in that case, it is the Joyce case, claimed that she had been injured in an automobile accident caused by the local police chief's son. It rings a bell, doesn't it?

And that in the Joyce case, the police conspired to defeat her state court damage suit against the son by revoking a traffic citation issued to the son, altering the police report for the accident, and painting new lines on the street at the accident scene.

The Joyce Court upheld a dismissal of Plaintiff's First Amendment claim that Defendants had violated her right of access to the courts, stating as follows, and the Court quotes:

"The plaintiff has the right under Ohio law to file her damage suit and to offer proof about the accident and the alleged destruction of relevant evidence. If she is able to prove that the Police Chief's son and his confederates undertook to destroy evidence of the son's negligence as a driver, there is no reason to believe that an Ohio court and jury would be unavailable and would not do justice between the parties. Rather than having denied access, the defendants have opened themselves to punitive damages and converted a small claims matter into a significant case, albeit not a federal one."

The Joyce court added that Plaintiff should have an opportunity to pursue her claim in state court.

Now, next, we have a federal district court in the Southern District of Ohio who distinguished Joyce when it held that police could have violated a plaintiff's right of access by intentionally concealing the intoxication of an off-duty police officer who had

struck the plaintiff in an automobile accident. Referencing the Fisher v. City of Cincinnati case, in 753 F.Supp., a 1990 case.

The Fisher Court found the Joyce case inapplicable for three reasons:

In the first place, in Graham v. National Collegiate Athletic Association out of the Sixth Circuit, 1986, 804 F.2d, the Sixth Circuit recognized a claim and cause for action for a violation of the right of access.

Second, other circuits have recognized a cause of action specifically for police coverups, and the Graham opinion cited, of course, those cases.

Third, the Fisher court implied that the Joyce Court improperly analyzed the right of access claim as a procedural due process claim, rather than as a claimed violation of a specific constitutional guarantee.

Well, Counsel, this Court declines to follow the Fisher opinion for the simple reason it fails to adequately distinguish itself from the Joyce case. Although the Sixth Circuit acknowledged the abstract right of access to the courts in Graham, the facts of Graham

certainly did not concern a government coverup that was designed to shield a person from tort liability. The Graham Court instead allowed a plaintiff to pursue a right of access claim against state actors because they had retaliated against the plaintiff for having exercised his right of access to the courts.

Quoting that case:

> "Plaintiff cannot claim, however, that Defendants completely denied him access to the courts, since he successfully pursued his state court action. . . Graham's claim is therefore not the typical right of access claim. Rather, it is more accurately characterized as a claim of retaliation for the exercise of a First Amendment right. That is, [plaintiff] is claiming that he was kicked off the University football team in retaliation for filing the state court action."

Citing the Graham case. Graham, therefore, did not overrule, either explicitly or by implication, the precise holding that we find in the Joyce case out of the Sixth Circuit.

Further, although the Graham Court cited opinions from other

circuits which reached the opposite conclusion as the Joyce Court, it cited those opinions without discussion and merely for the proposition that an abstract right of access to the courts exists.

Well, regardless of the persuasiveness of opinions from other circuits, neither Graham nor any other Sixth Circuit case suggests that Joyce is no longer controlling precedent.

Finally, the Fisher case is simply incorrect when it suggests that Joyce analyzed the right of access to the Courts only as a due process violation, because Joyce explicitly analyzed the right of access claim as an independent violation of the First Amendment.

The plaintiff here has ably argued that the existence of a state-tort remedy is irrelevant when state actors violate a specific constitutional guarantee such as the right of access to the courts. This truth does not undermine the holding in the Joyce case.

As we have noted, Joyce did not rely exclusively on a due process analysis. The opinion also did not rest on the assumption that state tort remedies can cure an admitted violation of the Constitution. Joyce instead held that no underlying constitutional violation ever occurs when a police cover-up fails to prevent a plaintiff from filing a

suit. There is the crux of it.

The Sixth Circuit therefore requires the plaintiffs to demonstrate a high degree of actual impairment of access before it will find that a plaintiff's right of access to the courts has been violated.

Then, lo and behold, we have yet another opinion from the Southern District of Ohio, and it has distinguished Joyce on more compelling grounds than that set forth in the Fisher opinion.

The Court in the Cincinnati Radiation Litigation case out of 874 Fed., Southern District of Ohio, acknowledged that Joyce dismissed a plaintiff's right of access to the court's claim because she still had the ability to file her damages suit under state law, despite the conduct of the police officers.

The Cincinnati Radiation Court nonetheless refused to dismiss an access to the court's claim because, unlike in the Joyce case, the alleged cover-up had prevented Plaintiffs from suing for over 20 years after the injury occurred. Extraordinary on the facts. The decision in Cincinnati Radiation therefore turned o how long the defendants succeeded I concealing facts and preventing Plaintiffs

from pursuing possible tort claims.

Accordingly, this Court interprets Joyce and Cincinnati Radiation to hold that whether Defendants could have violated Plaintiff's right of access depends upon when Plaintiff became aware of the particular identity or the existence of the alleged second driver.

The fact that Plaintiff never has filed a state wrongful death suit against a particular individual alleged to be the second driver is not dispositive: the relevant inquiry is whether the plaintiff could have filed such a suit, if she had wanted to.

In this case, the decedent was struck on September 30, 1988. The statute of limitations in Michigan for wrongful death action is three years from the time of the injury. That is old law in the State of Michigan, as you know. That has been settled by the Hardy case and others as recently as late in 1987.

The plaintiff has alleged here that during the police investigation of this accident rumors emerged in the community that the identity of the second driver was the son of a high-ranking police officer. If my memory serves me, apparently the second in command.

Moreover, the plaintiff has asserted that Defendants received at least two anonymous tips stating that Russell Kulinski, a police commander at the time of the accident, was one of the drivers who struck the decedent. Further, the plaintiff has asserted that these defendants ignored the possibility that Kulinski or his son Todd was involved in the accident.

When exactly Plaintiff first became aware that either Russell or Todd Kulinski could have been the second driver is unclear: although Plaintiff asserts that tips implicating the Kulinskis surfaced early in the investigation, Plaintiff's complaint states that the identity of the second driver is or was unknown.

Well, if the plaintiff knew or thought at the time of filing the instant lawsuit that Defendants engaged in a coverup specifically to shield one of the Kulinskis, then, under Joyce, Plaintiff could have pursued a state court claim against the Kulinskis or a John Doe, as they did later, as I understand it, and any coverup by the defendants would not have deprived the plaintiff of her right of access to the courts.

Parenthetically, and just as an open-end question, really, is the

actual identity the real question here? I don't think that it is. This Court does not feel that it is.

On the other hand, if the plaintiff did not become aware of the identity of the beneficiaries of the alleged coverup until after the statute of limitations had run, then Defendants may have violated Plaintiff's right of access even under Joyce. But that is not our case.

Parenthetically, if it is the plaintiff's position that she does not and never can know who the second driver is, and that the lack of an adequate investigation into the possibility of a second driver alone implies that the police must have been protecting somebody, then Plaintiff has admitted that she has no case.

The Court denied Defendants' motion for summary judgment as to the access to the courts claim in a bench opinion on February 22, 1993, because the deposition testimony of Defendant Cooper indicated that the defendants may have concealed facts specifically in order to protect one of the Kulinskis (rather than some mysterious and unidentified person).

The Court also noted when denying the motion for summary judgment that plaintiff only had a cause of action for an intentional

concealment by Defendants, rather than for a sloppy investigation. Plaintiff therefore states a valid claim only if an intentional coverup prevented her from suing Russell or Todd Kulinski before the statute of limitations expired on a wrongful death claim.

Now, in my years on the bench, I have never addressed by Court quite like this, but it's always a first time. So, I will put it this way:

It may well be that the United States Sixth Circuit Court of Appeals will hold or find or opine that the Joyce opinion is not reasoned all that well, but because some might feel it ignores what all other circuits have stated, or at least other circuits have stated, that is, access to the courts claim is viable whenever state actors may have interfered with a plaintiff's ability to pursue a claim. The state actors do not have to have destroyed the claim to have violated the Constitution.

Nonetheless, and in spite of those passing observations, Joyce is still the law as this court feels it is in its considered judgment, even though other district courts have in effect undermined it when purporting to have found the opinion factually distinguishable.

Now, this Court may suggest that all it lacks is that the Joyce opinion should be re-examined, but it is not this Court's function to throw down the gauntlet and try to set a new precedent: that is one of the United States District Court's reversing its own United States Court of Appeals. I am not that much of an activist, nor that adventuresome, believe me.

So, then the Court will dismiss this case, and I assume the plaintiff will promptly appeal, and I think you should; and that is as far as I can go as being of counsel to you, is to recommend that you take an appeal on this. Maybe you can get this thing settled in the Sixth Circuit.

You, Mr. Grifka, will prepare the appropriate Order and have it in to Ms. Henson at or before one o'clock tomorrow.

MR. GRIFKA: Thank you, your Honor.

THE COURT: Court is in recess.

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REPORTER'S CERTIFICATE

I, BARBARA C. CHATMAN, Official Court Reporter for the United States District Court of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing proceedings were had in the within-entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

_____

BARBARA C. CHATMAN, CSR-0077

Dated: _____

Detroit, Michigan